SUPREME COURT, U.S.
FILED
APR 1 1967
JOHN F. DAVIS, CLERK

No. 1127

In the

Supreme Court of the United States

JANUARY TERM 1967

SOUTHERN BROKERAGE COMPANY,

Petitioner,

v.

DAVID CANNARSA,

Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

BURFORD, RYBURN & FORD,
SPENCER C. RELYEA III,
FRANK M. RYBURN, JR.,
H. SAM DAVIS, JR.,
1511 Fidelity Union Life Bldg.,
Dallas, Texas 75201 RI 1-5811
Attorneys for David Cannarsa, Respondent.

WARLICK PRESS, INC.—P. O. BOX 10543—2263 VALDINA STREET—DALLAS—ME 1-3130

SUBJECT INDEX

	Page
Statement	1
Reasons For Denying Writ	2
1. Trial Court's Judgment Does Not Require Violation of Any Injunction	2
2. Respondent's Cause of Action Does Not Involve an Illegal Transaction	5
3. There is No Evidence of Illegality	6
4. Respondent is Not in Pari Delicto	12
5. Violation of the Securities Laws Does Not Make the Contract Unenforceable	13
Conclusion	16
Proof of Service	18

Page

Decisions

Bankers Life and Casualty Co. v. Bellanca Corp., C.A. 7, 1961, 288 F. 2d 784, cert. den. 368 U.S. 827, 7 L. Ed. 2d 31 ..... 15, 16

A. C. Frost & Co. v. Coeur D'Alene Mines Corp., 312 U.S. 38, 85 L. Ed. 500 (1940) 13, 15

Fuller v. Dilbert, D.C. N.Y. 1965, 244 F. Supp. 196 14

Graham v. Dean, Tex. Sup. Ct. 1945, 188 S.W. 2d 372 12

Guadalupe-Blanco River Authority v. City of San Antonio, Tex. Sup. Ct. 1947, 200 S.W. 2d 989 13

Lewis v. Davis, Tex. Sup. Ct. 1947, 199 S.W. 2d 146 12

Morrison v. City of Fort Worth, Texas Sup. Ct. 1941, 155 S.W. 2d 908 5

National Union Fire Ins. Co. v. Peck, Tex. Civ. App. 1927, 266 S.W. 338 13

Norman v. B. V. Christie & Co., Tex. Civ. App. 1962, 363 S.W. 2d 175 6

Pioneer Mutual Compensation Co. v. Diaz, Tex. Sup. Ct. 1944, 177 S.W. 2d 202 6

Redgrave v. Wilkinson, Tex. Civ. App. 1948, 208 S.W. 2d 150 6

Royal Air Properties, Inc. v. Smith, C.A. 9, 1962, 312 F. 2d 210 6

United States v. Morgan, D.C. N.Y. 1953, 118 F. Supp. 621 11

United States v. Gasomiser Corp., D.C. Del. 1947, 7 FRD 712 11

United States v. Minuse, C.A. 2, 1940, 114 F. 2d 37 11

Willard v. Knoblauch, Tex. Civ. App. 1918, 206 S.W. 734 6

Page

Wilson v. McLemore, Tex. Civ. App. 1951, 242 S.W. 2d 791 13

Wood v. Reznik, C.A. 7 1957, 248 F. 2d 549 14

Statutes and Rules

15 U.S.C. 78 cc(b) (Sec. 29 (b) Securities and Exchange Act, 1934) 15

14 U.S.C.A. 78o (Sec. 15 (c) (5), Securities and Exchange Act, 1934) 14

14 U.S.C.A. 78s (Sec. 19 (a) (4), Securities and Exchange Act, 1934) 14

S.E.C. Release No. 34-7920, July 19, 1966, Reg. 241, 7920 14

Texts

17 Am. Jur. 2d 904, 1008, "Contracts", Secs. 445 and 521 3

17 A CJS 1007-1008, "Contracts", Sec. 523 (1) b 3

13 Tex. Jur. 2d 567, 568, "Contracts", Sec. 311 3

No. 1127

In the

Supreme Court of the United States

JANUARY TERM 1967

SOUTHERN BROKERAGE COMPANY,

Petitioner,

v.

DAVID CANNARSA,

Respondent.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

Respondent, David Cannarsa, prays that Petition for Writ of Certiorari be denied.

STATEMENT

This suit was instituted by Respondent, David Cannarsa, as plaintiff for breach of contract whereby Respondent agreed to sell Petitioner 400 shares of the common stock of Jerome Richards & Co. for $7600. Respondent fully complied with the contract but Petitioner refused to consummate the pur-

chase. The trial court, based on the jury's verdict, entered judgment that Respondent recover the sum of $7600, the agreed purchase price.

Neither Respondent nor Petitioner were engaged in any illegal scheme or fraud. Neither knew of any such scheme or fraud at any time material to the transaction here involved. The suit for an injunction instituted by the United States, or one of its agencies, to enjoin trading in the Jerome Richards stock was not filed until after the contract between Respondent and Petitioner had been made, performance tendered by Respondent and refused by Petitioner. It was, evidently, still later when the injunction was granted.

There has never been a contention made that Respondent was a party to any illegal or fraudulent transaction. If any illegality be involved, it is that of certain employees of Kamen & Co. although there is no proof thereof in the evidence in this case.

REASONS FOR DENYING WRIT

1. Trial Court's Judgment Does Not Require Violation of Any Injunction.

Petitioner contended below, and here contends, that it would be illegal to render judgment for Cannarsa. The reasons assigned are that such a judgment would involve transfer of 400 shares of Jerome Richards stock in violation of an injunction of some federal court on some date not in the record but now alleged to be September 11, 1963. The terms of that injunction are not known, as Petitioner did not seek to introduce the same into evidence; nor is it known whether

such injunction still is in force, and if so, whether it prohibits the parties hereto from trading in the Jerome Richards stock.

Assuming, however (which Respondent does not concede) that the injunction prohibits these parties from trading in such stock, the existence of the injunction is immaterial. Respondent, as Plaintiff, did not sue to enforce the contract, but sued for his damages by reason of Petitioner's breach thereof.

> "As a general rule, an ordinary breach of contract by one party * * * immediately confers on the injured party, without the necessity of any affirmative action on his part, a right to sue for damages, or a right to rescind the agreement or to seek specific performance thereof. Furthermore, an ordinary breach of contract by one party also results in excusing performance of the agreement by the other party. Thus, no liability will attach to the party not in default if, subsequently to the other's breach, he places himself in a position that makes it impossible for him to perform the agreement." 13 *Tex. Jur.* 2d 567, 568, "Contracts", Sec. 311.

Accord: 17A *CJS* 1007-1008, "Contracts", Sec. 523(1)b; 17 *Am. Jur.* 2d 904, 1008, "Contracts", Secs. 445 and 521.

Consequently, on Respondent's breach of the agreement, Petitioner had his choice of remedies. If he had elected to sue for specific performance, there might be some justification for Petitioner's claim that it will be forced to violate some injunction. Instead, however, Respondent chose to sue for his damages.

Under the foregoing authorities, the right to sue for breach arises immediately upon the breach. On July 10, 1963, a rep-

resentative of Kamen and Company called Cannarsa suggesting he buy 400 shares of Jerome Richards stock from Cirlin Associates at 18⅞ per share and sell the 400 shares to Southern Brokerage at 19 per share (S.F. 82, 82; Defendant's Exhibit 3).* On the same day, July 10, 1963, petitioner's president, Moore, received a call from Kamen and Company suggesting that Petitioner buy 400 shares of Jerome Richards stock from Cannarsa at 19 per share and sell the same to Rybyl, Inc. for 19⅛ (S.F. 18, 19).

On July 10, Petitioner forwarded to Cannarsa a confirmation showing that Southern Brokerage, as principal, bought from Cannarsa 400 shares of Jerome Richards at 19, or a total price of $7600 (S.F. Plaintiff's Exhibit 1). Likewise, Respondent Cannarsa sent a confirmation to Southern Brokerage that Respondent agreed, as principal, on July 10, 1963 to sell to Southern Brokerage 400 shares of Jerome Richards at 19, or a total price of $7600 (S.F. 34-35; 84-85; Plaintiff's Exhibit 2). Petitioner's president testified that the confirmations showed no discrepancy in the trade (S.F. 35). The confirmations establish the contract. The jury found that the contract was made on July 10, 1963 (Special Issue No. 1).

On July 29, 1963, Petitioner's president called Respondent seeking to cancel the trade; at that time, however, Respondent already had forwarded the stock for delivery to Petitioner and, on the same day, Petitioner refused delivery of the stock (S.F. 159; Def. Ex. No. 2; Special Issue No. 5).

* References to the Record are "S.F." for Statement of Facts and "Tr." for Transcript.

Assuming that an injunction against trading in Jerome Richards & Co. stock was granted and that it was granted on September 11, 1963, as now alleged by Petitioner, it is readily apparent that Respondent's cause of action occurred and was completed on July 29, 1963, several weeks before issuance of the injunction and a week prior to the time the suit for an injunction was filed according to Petitioner's allegation. The cause of action for breach was also complete a week prior to any public announcement of any fraud involved in trading the Jerome Richards stock (S.F. 68). In short, the judgment of the trial court does not require consummation of the trade; instead it awards Respondent his damages on a cause of action that was complete before trading in the stock was, or may have been, prohibited.

2. Respondent's Cause of Action Does Not Involve An Illegal Transaction.

Petitioner contends that the contract in question involves certain federal statutes, is therefore an illegal contract and cannot be enforced in any manner by the Courts. For this proposition is cited *Morrison v. City of Fort Worth*, Tex. Sup. Ct. 1941, 155 S.W. 2d 908. In that case, however, the plaintiff was allowed to recover even though an illegal contract was involved, the court saying, at pages 909, 910 (syl. 3, 4):

> "In order to establish her cause of action the plaintiff requires no aid from the illegal contract. Under such a record, the illegal contract constitutes no bar to the plaintiff's cause of action. This is because of the settled rule in this State that, even though a demand is in some way connected with an illegal transaction, still recovery may be had if the plaintiff requires no aid from the illegal transaction to establish his case."

Other Texas cases also establish that a cause of action is enforceable if not dependent on an illegal transaction although such transaction may appear incidentally and explain.

Pioneer Mutual Compensation Co. v. Diaz, Tex. Sup. Ct. 1944, 177 S.W. 2d 202;

Redgrave v. Wilkinson, Tex. Civ. App. 1948, 208 S.W. 2d 150, er. ref., n.r.e.;

Norman v. B. V. Christie & Co., Tex. Civ. App. 1962, 363 S.W. 2d 175, er. ref., n.r.e.;

Willard v. Knoblauch, Tex. Civ. App. 1918, 206 S.W. 734.

The foregoing rule is applicable here. Any manipulation of stock in Jerome Richards or any rigging of the prices thereof is not necessary to Cannarsa's case. The contacts with the representatives of Kamen and Company are helpful to explain the case but are entirely incidental. Cannarsa's case rests on the contract between Petitioner and himself for sale and purchase of stock. The existence of the contract, Respondent's compliance therewith, and Petitioner's breach were found by the jury based on the undisputed evidence. Consequently, any illegality that may have existed is incidental and does not preclude Respondent's recovery of damages.

3. There Is No Evidence of Illegality.

Both Respondent and Petitioner are brokers and dealers in stocks and securities (S.F. 3-4, 79). Respondent, Cannarsa, deals mainly in mutual funds while Petitioner deals mostly

in over-the-counter securities or securities not listed on any exchange; both, however, do some trading in stocks listed on the New York and other national stock exchanges; (S.F. 4, 79). Under the rules governing the New York Stock Exchange, a broker who is not a member of the Exchange cannot charge a commission for buying or selling listed stocks. Consequently, if a customer of Petitioner or Respondent desires to buy or sell a listed stock, Petitioner or Respondent sends the trade to a member of the Exchange who executes the transaction and who gets the entire commission (S.F. 4-5).

Addison Moore, Petitioner's president, testified that he first had contact with representatives of Kamen and Company, a New York brokerage firm and a member of the New York Stock Exchange, in April, 1963 (S.F. 3, 7). These representatives suggested that Petitioner refer any trades in listed stocks to Kamen and Company who would get the commission thereon, and Kamen and Company would refer trades in over-the-counter stocks to Petitioner (S.F. 5-7). Thereafter, representatives of Kamen called Petitioner's president and gave him trades in the stock of Jerome Richards & Co., Inc.; in each instance the representative of Kamen and Company would advise Petitioner from whom and at what price the Jerome Richards stock could be bought, and to whom and at what price Petitioner might sell (S.F. 11-13). In a six-month period, from January to July, 1963, Petitioner had eight or nine such transactions in Jerome Richards stock, all suggested by representatives of Kamen and Company (S.F. 10). In each instance, Petitioner and the other party exchanged confirmations and the trade was closed

(S.F. 13). In none of the eight or nine prior trades did Petitioner have any oral or written contract with the other party prior to the exchange of confirmations (S.F. 13).

David Cannarsa, Respondent, testified to similar contact with Kamen and Company, whereby that company offered to give Cannarsa trades in over-the-counter stock in return for Cannarsa's referring transactions in listed securities to Kamen and Company (S.F. 80, 81). In those instances, a representative of Kamen and Company would advise Respondent from whom and at what price to buy, and to whom and at what price to sell (S.F. 81, 82).

Throughout, Petitioner speaks of Cannarsa and Southern Brokerage as acting on "instructions from Kamen and Company." The jury's finding counters this theory. In addition, the undisputed testimony reveals that Petitioner Southern Brokerage Company showed on its confirmation that it acted as principal and not as agent, that all sales proceeds went to Petitioner and Petitioner used its own money to effect the purchases of Jerome Richards stock (S.F. 14-16). No commission was involved and none paid by Kamen and Company (S.F. 158). In addition, Petitioner Southern Brokerage Company received a guarantee from Kamen and Company before taking this trade (S.F. 168-170) and has instituted suit thereon in New York (S.F. 55, 56). Respondent Cannarsa did not receive any guarantee; he used his own money to buy the stock which Petitioner refused to purchase; Cannarsa indicated on the confirmation that he acted as principal, and he received no commission from Kamen and Company and was not employed by Kamen (S.F. 152-153).

Cannarsa never was a party to any rigging or fraud in connection with trading in Jerome Richards stock. He testified that he sincerely believed the stock was all right (S.F. 133). Southern Brokerage never contended that Respondent Cannarsa defrauded it or participated in any fraud practiced by Kamen and Company (S.F. 53). Respondent has never contended that Southern Brokerage was a party to any fraudulent scheme; instead, Respondent and apparently Petitioner, both, were innocent parties caught up in the rigging scheme of Kamen and Company. Petitioner's president summed up the situation of the parties in testifying as to a conversation he had with Cannarsa about the last of July, 1963:

"You and I apparently have been the victims of a very complex scheme or swindle that covers many, many brokers in many states * * *" (S.F. 68).

Since Respondent was found by the jury on undisputed evidence, as pointed out above, to have been acting for himself and not as an agent, there is no question of imputing any knowledge of the fraud to him. The question, then, revolves around when knowledge of the fraud first existed.

Cannarsa testified that two representatives of the S.E.C. called him and asked about this trade in Jerome Richards stock; this conversation occurred probably about the 20th or 21st of July, 1963 (contract was made July 10, 1963). The S.E.C. representatives did not inform Respondent of any fraud or rigging; instead, they advised Cannarsa that they were investigating *possible rigging* of trades in Jerome Richards stock (S.F. 93, 94; 121-134). Respondent, after such call, tried to contract the representatives of Kamen and Company

but was unable to do so (S.F. 121, 122). However, while discussing this trade, Respondent asked the S.E.C. representatives what to do about this deal; these representatives told Cannarsa that they did not see anything wrong with the trade or the way it was handled and told him to go ahead with it (S.F. 123). Upon receiving this advice, he honored the draft and paid for the Jerome Richards stock on July 25, and, the same day, sent the stock with draft attached to Dallas for delivery to Petitioner (S.F. 122-123; 93).

Representatives of S.E.C. called on Moore, Petitioner's president, on July 22, 1963, *investigating* trading in Jerome Richards stock (S.F. 73). Later, on July 29, 1963, Petitioner's president, after learning that the firm which was supposed to buy the 400 shares of Jerome Richards from Petitioner did not exist, called Cannarsa and said that the trade was off because of the fraud or scheme of Kamen and Company. At this time, however, Cannarsa had already forwarded the stock to Dallas; in fact, on the same day, July 29, Petitioner refused delivery of the stock (S.F. 159; Defendant's Exhibit 2; Special Issue No. 5).

The foregoing evidences that there was no knowledge of any fraud or scheme on the part of Cannarsa until after he had tendered the stock to Petitioner. Any information prior to that time was knowledge of an investigation; with this knowledge Cannarsa might not have entered into future transactions, but certainly the mere existence of an investigation does not reveal that illegal conduct occurred or justify termination of an executed agreement, especially where, as here, the investigators advised Respondent to proceed with the sale.

As a matter of fact, it was not until August 5, 1963, that the existence of fraud or a rigging scheme was made public, and only after that date that trading in Jerome Richards stock was prohibited (S.F. 68, 135-6). By that date, Cannarsa had tendered performance and Petitioner had refused to accept.

It ill behooves Petitioner to contend at this late date that Cannarsa and Southern Brokerage were participants in the rigging scheme; at the time of the transaction Petitioner's president clearly and properly placed the blame on Kamen and Company, and likewise properly characterized Cannarsa (and Petitioner, too) as "victims".

As opposed to the foregoing facts, Petitioner cites the statutes and states that there has been a violation thereof. The Court of Civil Appeals held, however, that the mere fact that matched orders are involved does not show a statutory violation. That holding is correct.

> *United States v. Morgan*, D.C.N.Y. 1953, 118 FS 621 (Syl. 10).

Intent is also an essential element to prove statutory violation.

> *United States v. Gasomiser Corp.*, D.C. Del. 1947, 7 FRD 712 (Syl. 6);
>
> *United States v. Minuse*, C.A. 2 1940, 114 F. 2d 37 (Syl. 3).

The evidence referred to above does not make out either element. The fact of the injunction does not make out a case of illegality since the order is not in evidence and there

is no showing that the injunction issued because of fraud and, if there were fraud, who participated therein. There may have been rigging but the record in this case does not disclose it. The record reveals only that some unknown parties were enjoined from trading in Jerome Richards stock, that injunction evidently being granted after Respondent had complied with and Petitioner had breached the contract. Prior to that time, Respondent had no knowledge of any rigging or scheme.

4. Respondent Is Not in Pari Delicto.

Under the facts, Respondent was not aware of any illegality, did not intend to violate any law and did not even have any knowledge thereof until after his cause of action occurred. Respondent was not in pari delicto; consequently the contract may be enforced.

Graham v. Dean, Tex. Sup. Ct. 1945, 188 S.W. 2d 372 (Syl. 2);

Lewis v. Davis, Tex. Sup. Ct. 1947, 199 S.W. 2d 146, (Syl. 15 and 16).

We do not mean to imply that Southern Brokerage was a party to the illegal scheme, nor that it was aware of any facts giving it knowledge of any illegality. Indeed, the testimony reveals that Petitioner's president was aware only of an investigation by the S.E.C. until some time subsequent to full performance of the contract by Cannarsa.

Certainly, then, if the courts will enforce a contract where one of the parties is guilty of illegal conduct, there is no reason why the courts should not enforce a contract where

neither party violated the law, especially when the violation is a collateral matter committed by third parties.

The situation here is similar to that where a party resists enforcement of a contract on the grounds of a fraud perpetrated by some third party. In such instances, the courts have held that the fraud of a third party is no defense to suit on a contract.

> *Wilson v. McLemore*, Tex. Civ. App. 1951, 242 S.W. 2d 791, er. ref., n.r.e., (Syl. 1);
>
> *National Union Fire Ins. Co. v. Peck*, Tex. Civ. App. 1927, 296 S.W. 338, er. dism. (Syl. 3 and 4);
>
> *Guadalupe-Blanco River Authority v. City of San Antonio*, Tex. Sup. Ct. 1947, 200 S.W. 2d 989 (Syl. 6).

Fraud of a third party is no defense. Likewise, illegality of a third party should be no defense.

5. Violation of the Securities Laws Does Not Make the Contract Unenforceable.

Respondent does not admit, but denies, that there was any violation of the Federal Securities Acts. If, however, a violation did occur, the contract is still enforceable. The leading case, involving Securities Act violations, is *A. C. Frost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38, 85 L. Ed. 500 (1940). This court, in holding the contract enforceable although the securities involved had not been registered as required by law, said:

> "The rule that contracts in contravention of public policy are not enforceable came under discussion in Steele v. Drummond, 275 U.S. 199, 72 L. Ed. 238, 48 S. Ct. 53 and Twin City Pipe Line Co. v. Harding Glass

> Co., 283 U.S. 353, 356, 357, 75 L. Ed. 1112, 1115, 1116, 51 S. Ct. 476, 83 A.L.R. 1168; In the latter the opinion declares, the principle 'should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. It is only because of the dominant public interest that one who, like respondent, has had the benefit of performance by the other party will be permitted to avoid his own promise.'
>
> "The protean basis underlying this doctrine has often been stated thus—No one can lawfully do that which tends to injure the public or is detrimental to the public good. If it definitely appears that enforcement of a contract will not be followed by injurious results, generally, at least, what the parties have agreed to ought not to be struck down."

Similar holdings are:

Wood v. Reznik, C.A. 7, 1957, 248 F. 2d 549;

Fuller v. Dilbert, S.D.N.Y., 1965, 244 F.S. 196.

The foregoing rule is especially applicable here since no public purpose would be served by refusing to permit Respondent's recovery; the only result is to penalize Respondent who performed his contract completely unaware of any illegality.

That a person's lack of knowledge of illegality makes the contract enforceable has been recognized by the S.E.C. In regard to its power to issue stop orders under Sec. 15(c)(5) or Sec. 19(a)(4) of the Securities Exchange Act of 1934 (14 USCA 78o & 78s) the Commission by its release no. 34-7920, July 19, 1966, Reg. 241.792D, stated:

> "A number of questions have been presented recently as to whether, during the period when trading is suspended by order of the Commission pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act

of 1934, a broker or dealer may complete (e.g. by payment or delivery) an agency or principal contract entered into prior to the suspension.

"It is the position of the division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension * * *, no objection need be raised under such sections because the broker-dealer completes his contractual obligations * * *."

The rule of *Frost and Co. v. Coeur D'Alene Mines Corp.*, supra, and the reasoning contained in the aforesaid S.E.C. release are embodied in the terms of the applicable statute. Section 29(b) of the Securities Exchange Act of 1934, 14 USCA 78cc(b), provides in part:

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder shall be void (1) as regards the rights of any person who, in violation of any such provision, rule or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation * * *".

A reading of the statute reveals that contracts, involving validity of the Securities Exchange Act, are void only as regards to one who violated the statute. In *Bankers Life &*

Casualty Co. v. Bellanca Corp., C.A. 7, 1961, 288 F. 2d 784, cert. den., 368 U.S. 827, the court said:

> "Under the provisions of Sec. 78cc(b) the consequence of a violation is that the contract shall be void 'as regards the rights of any person, who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, * * *'. It is only the *contract rights* of the party in violation which are voided. The party in violation can not enforce his or its rights thereunder. But no rights of the party not in violation are impaired."

In construing the same statute, the court, in *Royal Air Properties, Inc. v. Smith*, C.A. 9, 1962, 312 F. 2d 210, at page 213, said:

> "Although section 29 (b) declares such illegal contracts void as regards the right of any violator, it does not make such contracts void as regards the rights of the innocent party to the contract."

Here, Respondent is an innocent party. He did not violate any statute nor was he aware of any violation at any material time until after he had fully complied with the contract and Petitioner had breached by refusing delivery. Under Sec. 29(b) the contract is enforceable.

CONCLUSION

This is a suit for breach of contract. There is no illegality or statutory violation involved in the contract, nor any culpable conduct by either party thereto. Therefore, no reason is shown as to why it should not be the basis for recovery of damages.

Petitioner contends that the contract is illegal. This contention, however, is sterile of any supporting facts. There

is no showing of misconduct by Respondent, nor of any evil intent on his behalf, both of which are required to prove a violation of the statute. The deficiency in proof is not supplied by a reference to an injunction issued by some federal court at some time after Cannarsa's cause of action arose. The terms of the injunction are not in the record and any findings of that court are based on conjecture.

If there be fraud or statutory violation, it is attributable to third parties. Respondent was not a party to any fraud or rigging scheme and was ignorant of any such fraud or scheme (if any there were) until after the contract had been executed and performance tendered by Respondent. Likewise, Petitioner was not a party to any such scheme and had no knowledge thereof, although its president was sufficiently suspicious to require a guarantee on the trade. Under such circumstances, it is not the law, nor the policy of the law, to declare the contract null and void.

WHEREFORE, Respondent prays that Writ of Certiorari be denied.

BURFORD, RYBURN & FORD,

By Spencer C. Relyea III
SPENCER C. RELYEA III,
FRANK M. RYBURN, JR.,
H. SAM DAVIS, JR.,
1511 Fidelity Union Life Bldg.,
Dallas, Texas 75201 RI 1-5811
Attorneys for David Cannarsa, Respondent.

PROOF OF SERVICE

A copy of the Foregoing Reply to Petition for Writ of Certiorari was served on Attorneys for Petitioner this 29th day of March, 1967, by mailing a copy thereof in a properly addressed envelope, first class postage prepaid.

By Spencer C. Relyea III